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No. 09-272

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ATHENS DISPOSAL COMPANY, INC.
dba ATHENS SERVICES,

Petitioner,

v.

EDIXON FRANCO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF CALIFORNIA,
SECOND APPELLATE DISTRICT, DIVISION ONE

REPLY BRIEF

KYLE D. BROWN
Counsel of Record
JAMES A. BOWLES
E. SEAN MCLOUGHLIN
HILL, FARRER & BURRILL, LLP
300 S. Grand Avenue, 37th Floor
Los Angeles, CA 90071
Telephone: (213) 620-0460
Fax: (213) 624-4840

Attorneys for Petitioner

226974

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

CORPORATE DISCLOSURE STATEMENT

Petitioner's Corporate Disclosure Statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that Statement.

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SUMMARY OF REPLY ARGUMENT

Respondent attempts to dissuade this Court from granting review in this case by advancing a number of flawed legal contentions

First, Respondent argues that the conflict between the California courts and the majority of federal courts, a conflict noted by numerous legal commentators, is but an illusion. Respondent posits that this conflict can be harmonized, because the cases which invalidate arbitration agreements with class waivers involve the application of *state* law unconscionability principles, while the cases which enforce class waivers involve *federal* statutory claims and eschew unconscionability analysis.

This argument vividly illustrates exactly why review is necessary. Those state and federal courts that are intent on invalidating class action bars in arbitration agreements rely on a perversion of the unconscionability doctrine as a subterfuge to avoid FAA preemption. In contrast, the majority of federal courts, which enforce class waiver provisions, reject the notion that arbitration is an inferior forum for vindicating statutory rights or that class arbitration bars are *per se* "unconscionable."

Respondent argues the FAA does not preempt California's rule invalidating arbitration agreements which bar class actions because that rule is purportedly arbitration neutral. This contention is a non-sequitur. *Only* arbitration agreements can preclude class procedures in arbitration. California has *only* applied its public policy favoring class actions to invalidate

arbitration agreements. The minority of court decisions, cited by Respondent, pointedly illustrate the need for this Court to grant review and reaffirm that state laws which disfavor arbitration agreements are preempted by the FAA.

The decision below, if not reviewed and corrected, creates an absurd dichotomy in which the validity of class action waivers in FAA covered agreements will depend on the fortuity of what court hears the case. California courts and the Ninth Circuit should not be permitted to insulate their attack on arbitration from preemption merely by the talismanic invocation of the word "unconscionable." This brand of unconscionability analysis is not applicable to contracts generally, but instead invalidates only arbitration agreements. The FAA plainly forbids this.

Second, Respondent incorrectly contends this case is a poor vehicle for reviewing this important federal question. Because no state law policy applicable to a subset of agreements (employment arbitration agreements) or types of disputes (wage and penalty claims under the California Labor Code) is exempt from the effect of the FAA, there cannot be any "independent state law grounds" upon which to uphold the decision of the court below. Respondent's further arguments regarding jurisdiction under the FAA or preservation of the federal issue on appeal are contradicted by the record.

Review Should Be Granted Because This Case Is Closely Related To *Stolt-Nielsen*

On December 9, this Court heard argument on the question whether, consistent with the FAA, class arbitration may be imposed on parties whose arbitration clauses are silent on that issue. *Stolt-Nielsen, et al. v. Animalfeeds, International Corporation*, No. 08-0119. During argument, Justice Ginsburg asked respondent's counsel the precise question directly posed by Athens' Petition:

> Let's assume that you prevail in this case . . . I would assume that the tankers are now going to add to their contract, as many contracts do, a provision saying no class action. . . . If the arbitration agreement says – agreed to arbitrate any and all disputes but you may not proceed on behalf of a class, would that preclude you from bringing a class action anyway?

Transcript, p. 56, ln. 17-24.

This case presents that very question—whether the FAA requires a court to enforce an arbitration agreement that expressly bars class arbitration—in a context where the class action waiver does not act as an exculpatory clause or otherwise preclude the vindication of statutory rights. Because this case presents an opportunity to immediately resolve an issue that naturally flows from *Stolt-Nielsen* review is plainly warranted.

Review Should Be Granted Because The FAA And This Court's Precedents Prohibit Selective Application Of State Law To Disfavor Arbitration

The decision of the court below conflicts directly with this Court's decisions holding that state-law policies which do not apply generally to "any contract" may not preclude enforcement of the terms of an agreement to arbitrate. 9 U.S.C. § 2.[1] This Court's decisions hold that state laws of particular application to arbitration, whether of legislative or judicial origin, do not provide a basis for refusing to enforce agreements to arbitrate. *Southland Corp. v. Keating*, 465 U.S. 1, 16 n. 11 (1984); *Perry v. Thomas*, 482 U.S. 483, 490-91 (1987) *Preston v. Ferrer*, 552 U.S. __, 169 L.Ed.2d 917, 925 (2009).

California, however, has flouted this federal policy. California decisions indicate a judicial unwillingness to enforce arbitration agreements deemed to conflict with California's public policy favoring class actions. In the seminal decision of *Discover Bank v. Boehr*, 36 Cal. 4th 148 (2005), a sharply divided California Supreme Court rejected the argument that the FAA precluded the State from imposing classwide arbitration upon parties who had agreed to only individual arbitration. Trying to avoid

[1] For an empirical analysis of California's discriminatory application of "unconscionability" to invalidate arbitration agreements more than five times more frequently than other contract provisions, *see* Broome, *An Unconscionable Application Of The Unconscionability Doctrine: How The California Courts Are Cirumventing The Federal Arbitration Act*, 3 *Hastings Business Law Journal* 39 (2006)(concluding that "the California courts are clearly biased against arbitration as an alternative means of dispute settlement").

preemption, the *Discover Bank* majority invoked the doctrine of unsconsionability, and limited its application to arbitration clauses which amounted to exculpatory clauses because of the necessarily small amounts involved in the underlying consumer claims. *Id.* at 160-163. The Ninth Circuit has adopted this position. *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976 (9th Cir. 2007).

This inexorable expansion of a judicially declared public policy favoring class actions over the express terms of parties' arbitration agreements continued when the sharply divided California Supreme Court dropped any pretense that the policy favoring class actions was limited to only claims involving small amounts of money. *Gentry v. Superior Court*, 42 Cal. 4th 443, 458 (2007). In doing so, the California Supreme Court also untethered its analysis from anything resembling traditional unconscionability analysis.[2] The public policy favoring classwide arbitration morphed from a prohibition on exculpatory clauses into an inquiry whether class arbitration might be "significantly more effective practical means of vindicating the rights of the affected employees than individual [ ] arbitration" regardless of the actual ability of such employees to vindicate their individual statutory rights in the arbitral forum. *Id.* at 463.

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[2] Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. Disp. Resol. 61 (2005).

This case represents the logical conclusion of the trend. Since *Gentry* all published decisions involving wage and hour claims under the California Labor Code have refused to enforce arbitration agreements containing class action waiver provisions. Appendix A; *Murphy v. Check 'N Go of California, Inc.*, 156 Cal. App. 4th 138 (2007); *Sanchez v. Western Pizza*, 172 Cal. App. 4th 154 (2009); *Olvera v. El Pollo Loco, Inc.*, 173 Cal. App. 4th 447 (2009). In effect the California courts have imposed a *per se* rule invaliditating class waivers in arbitration agreements as applied to claims under the Labor Code. The judicial public policy favoring class action treatment for wage claims has, under the rubric of unconscionability, been used to justify invalidation of arbitration agreements. This Court forbade such circumvention of the FAA based on State policy in *Perry* and *Preston*.

The California decisions are based on the faulty premise that courts are free to rewrite arbitration agreements as long as they invoke a doctrine of general applicability, like unconscionability. But the selective use of such doctrines to invalidate class action bars in arbitration agreements reflects a state policy mandating a particular type of arbitration procedure *notwithstanding* the contracting parties' wishes. This is doubly apparent here, where the trial court determined that the arbitration provision did not exculpate Athens from any potential substantive liability to Franco under the Labor Code. Appendix B, 45a ("Defendant's Mutual Arbitration Policy does not in any

way disadvantage employees who pursue claims in individual arbitrations").[3]

The FAA does not permit States to trample on arbitration rights through the charade of pretending to apply a general doctrine like unconscionability. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687-88 (1996); *Mastrobuono*, *supra*, 514 U.S. at 58. What matters is not the label placed on the state policy, but whether that law or policy is specific to arbitration. Were the law otherwise, States would be free to thwart arbitration by simply calling some disfavored arbitration provision "unconscionable."

California courts allow waivers of class action claims under general contract law outside of arbitration agreements. *Chindarah v. Pick Up Stix, Inc.*, 171 Cal.App.4th 796 (2009) (affirming validity of individual settlement agreement disposing of putative class claims); *Watkins v. Wachovia Corp.*, 172 Cal. App. 4th 1576, 1588-1592 (2009)(dismissing putative class representative's appeal based on her agreement to settle her individual claims). Respondent is unable to point to any California case invalidating a class action waiver contained in a non-arbitration contract.

The reason is obvious. *Only* arbitration agreements specify whether or not class claims and procedures are permissible or precluded in arbitration. Requiring class

[3] The trial court found Franco could pursue Labor Code Private Attorney General Act ("PAGA") claims in arbitration. PAGA claims do not require class action procedures. *Arias v. Superior Court*, 46 Cal. 4th 969, 975 (2009).

action procedures in arbitration is not an "arbitration neutral" rule of general applicability, but is rather an arbitration specific rule designed to rewrite or invalidate only a single kind of contract—the very kind that the FAA was written to protect.

California's judicial foray into subverting the dictates of the FAA under the cloak of unconscionability has spilled over into the federal courts, creating a split of authority among the circuits. *Compare Gay v. CreditInform*, 511 F.3d 369 (3d Cir. 2007) (rejecting the argument that Pennsylvania unconscionability law was insulated from further scrutiny under the FAA and explaining that state-law "unconscionability" rules are preempted when they "rel[y] on the uniqueness" of an arbitration provision); *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 167 (5th Cir. 2004) ("Even when using doctrines of general applicability, state courts are not permitted to employ those general doctrines in ways that subject arbitration clauses to special scrutiny."); *Banc One Acceptance Corp. v. Hill*, 367 F.3d 426, 432 (5th Cir. 2004) (same); with *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, at 1221 n.3 (9th Cir. 2008) (expressly declining "to follow the holding in *Gay*."); *Shroyer, supra*, 498 F.3d 976.

Respondent cites eight State Supreme Court decisions from jurisdictions outside California that also invoke principles of state contract law to strike down arbitration agreements with class action waivers. But these cases in fact point to the very reason why this Court should grant review—other jurisdictions are now following California's example of how to skirt the FAA.

The FAA Requires A Uniform National Standard For Evaluating Class Waivers In Arbitration Agreements

The decision below is based on an unfounded distrust of arbitration as a forum for California Labor Code claims.

This Court has repeatedly condemned judicial suspicion of arbitration as an inferior forum, stating "the recognition that arbitration procedures are more streamlined than federal litigation is not a basis for finding the forum somehow inadequate; . . . objections centered on the nature of arbitration do not offer a credible basis for discrediting the choice of that forum to resolve statutory [ ] claims." *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1470-1472 (2009).

In a trilogy of cases this Court has developed the sole test that is to be used in determining whether a particular arbitral forum is unsuitable for resolving statutory claims. *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 637 (1985); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991); *Green Tree Financial Corp.—Alabama v. Randolph*, 531 U.S. 79, 90 (2000). In *Randolph*, this Court reiterated the standard that "so long as a prospective litigant effectively may vindicate [his or her] statutory causes of action in the arbitral forum, the statute [FAA] serves its functions." 531 U.S. at 90. *Randolph* rejected as too "speculative" and unsupported by evidence the plaintiff's argument that large arbitration costs might preclude the plaintiff from arbitrating her individual claim and vindicating her

statutory rights. The Court held that "the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Id.* 531 U.S. at 522-523.

These decisions reflect the yardstick by which to measure the sufficiency of any arbitral forum under the FAA—whether it permits a party to vindicate his statutory rights. If he can do so, the arbitration agreement cannot, by definition, be unconscionable.

The FAA was enacted to provide a uniform nationwide law. This is so because federal case law under the FAA constitutes a body of substantive law on the enforceability of arbitration agreements. *Southland, supra*, 465 U.S. at 12; *Perry, supra*, 482 U.S. at 489. The FAA and the case law interpreting it preempt and displace contrary state law, legislative or judicial. *Southland, supra*, 465 U.S. at 10; *Perry, supra*, 482 U.S. at 490 ("The FAA's displacement of conflicting state law is 'now well established.'"). This preemption takes place because "Congress would not have wanted state and federal courts to reach different outcomes about the validity of arbitration in similar cases." *Allied Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 271 (1995)

Where the federal substantive law under the FAA has determined that a particular type of arbitration provision is enforceable, California courts cannot refuse to enforce such provisions, even if state law would require otherwise. *Thomas v. Perry*, 200 Cal. App. 3d 510, 514-515 (1988) (". . . we must determine whether the arbitration clause would be held unconscionable and unenforceable as a matter of *federal* law."). State courts

and federal courts should reach identical results under the FAA and the federal substantive law of arbitrability when confronted with identical arbitration provisions. The alternative is chaos.

Conflict and confusion in the law promote inconsistency and unfairness and "encourage and reward forum shopping." *Southland*, *supra*, 465 U.S. at 15. Without a uniform nationwide standard, the determination whether class arbitration may be mandated by a court will turn on the happenstance of geography, rather than on the intent of the parties expressed in the terms of their arbitration agreements. A uniform body of federal law is vital because the same arbitration agreements often apply to nationwide employers and other businesses. The absence of a uniform national standard will foster geographic forum shopping and forum shopping between federal and state courts. Review should be granted to provide a uniform standard on the issue of whether express class arbitration waivers in arbitration agreements are enforceable, and what a party seeking to prevent enforcement of such an agreement must prove under the FAA.

The court below did not find that the procedures in arbitration would interfere with Respondent's ability to individually vindicate his statutory rights, yet it reached a result that conflicts with federal cases that have enforced substantially identical class action bars. The decision below, based on the *Gentry* view that a California's judicial affinity for class procedures trumps the FAA's policy that arbitration agreements be enforced in accordance with their terms, applied a generalized

suspicion of arbitration and state parochial concerns about efficiency of enforcement of state statutes to outweigh the federal statutory requirement that required enforcement of the parties' arbitration agreement in accordance with its terms. The decision below was plainly wrong in failing to apply federal substantive law under the FAA and refusing to enforce the individual arbitration requirement in the agreement.

This Case Squarely Presents The Issue Of Federal Preemption

The trial court correctly determined that the FAA applied. Appendix B at 45a. That determination was not challenged by Respondent on appeal. Appendix A at 4a. Athens raised the FAA preemption issue at each stage of the proceedings and preserved the issue on appeal. As the Court of Appeal noted: "Athens made a straightforward argument: Under the FAA, arbitration was mandatory." Appendix A at 5a.

Although the issue was raised by Athens at each stage of the proceedings, neither the Court of Appeal nor the California Supreme Court specifically addressed the FAA question in this case. State courts cannot insulate themselves from review of federal law questions by mere silence. The court below relied upon *Gentry*, where California's Supreme Court expressly rejected the argument that the FAA prohibited the court from rewriting the parties' contract to require class arbitration. *Gentry*, 42 Cal. 4th at 462-463. Thus, the Court of Appeal's reliance on *Gentry*, to the exclusion of and contrary to federal law, squarely presents the issue of FAA preemption.

Respondent briefly suggests that it is "unclear whether the FAA even applies to this case." After conceding that this issue was not preserved by Respondent in the trial court or on appeal, Respondent nevertheless argues that he was exempt from the FAA under Section 1, even though he was employed solely as a local trash truck driver. The exemption, however, is narrowly construed, and does not extend either to local intrastate drivers or to trash, which by definition has left the stream of commerce and is headed to the dump. *Circuit City v. Adams*, 532 U.S. at 112, 117 (2001) (employees not engaged in the actual interstate movement of goods in the flow of commerce are not excluded from the FAA); *Perez v. Globe Airport Security Services*, 253 F.3d 1280, 1283-84 (11th Cir. 2001). Because Respondent's argument was waived in the courts below and no evidence was presented that Respondent himself transported goods across state lines and in the flow of commerce, there is no basis to find Respondent exempt from the FAA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KYLE D. BROWN
Counsel of Record
JAMES A. BOWLES
E. SEAN MCLOUGHLIN
HILL, FARRER & BURRILL, LLP
300 S. Grand Avenue, 37th Floor
Los Angeles, CA 90071
Telephone: (213) 620-0460
Fax: (213) 624-4840

Attorneys for Petitioner